Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-766

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EUGENE H. DUFFY, et al.,

Petitioners,

v.

JAMES W. WETZLER, et al.,

Respondents.

# BRIEF OF RESPONDENTS CITY OF NEW YORK AND ITS FORMER AND PRESENT COMMISSIONERS OF FINANCE IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

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## QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is in accord with this Court's mandate in Duffy v. Wetzler, __U.S.__, 113 S. Ct. 3027 (1993), where full refunds will be paid to all those federal retirees who have filed valid, timely refund claims.

2. Whether the substantive defenses to petitioners' claim for damages under 42 U.S.C. § 1983 are impacted by this Court's decisions in Hafer v. Melo, 502 U.S. 21 (1991), or Collins v. City of Harker Heights, __U.S.__, 112 S. Ct. 1061 (1992), decided subsequent to the trial court's decision in this case.

3. Whether the denial of class certification and attorneys' fees under the common fund theory "thwarts the enforcement of federal rights" under 42 U.S.C. § 1983.

4. Whether the denial of class certification and attorneys' fees under the common fund theory on independent state grounds provides a basis for granting a writ of certiorari.

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## STATEMENT OF THE CASE

This action was commenced by petitioners in New York Supreme Court in 1989, seeking declaratory and injunctive relief with respect to their rights under Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), to refunds of state income taxes paid on their federal pensions. The balance of the relief requested concerned various bids for attorneys' fees disguised as class certification, a claim for damages pursuant to 42 U.S.C. § 1983 and/or attorneys' fee under the common fund doctrine.

On June 27, 1994, the State announced that it would pay full refunds plus interest to those federal retirees who filed timely refund claims. Subsequently, the Appellate Division, Second Department, correctly held that the issues in this case related to refunds are academic. Regarding the remaining issues, the only one involving a question of federal law is petitioners' claim for damages/attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988. This issue, as

well as the issues of class certification and common fund attorneys' fees, were correctly decided by the Second Department in respondents' favor. Petitioners' claims of Constitutional violations are completely meritless and these are not otherwise issues of national importance. Consequently, this Court should deny petitioners' application for a writ of certiorari.

In its Memorandum Decision dated April 10, 1990, the Supreme Court, Queens County, held that former § 612(c)(3) of the Tax Law and the corresponding provision of the former Administrative Code of the City of New York were invalid and unconstitutional; respondents were enjoined from assessing and collecting personal income taxes which were still due and owing; and were enjoined from refusing to grant refunds to those taxpayers who had complied with the procedural requirements of the Tax Law for obtaining refunds. Pet. p. 31a-33a, 148 Misc.2d 459, 555 NYS2d 543 (Sup. Ct., Queens Co., 1990).

The Court, however, denied petitioners' application for class certification and dismissed their claims for relief under 42 U.S.C. § 1983 and for monies had and received. Pet. p. 33a-38a, 148 Misc.2d at 464-70, 555 N.Y.S.2d at 546-50. By separate post-judgment orders dated October 1, 1990, the Queens County Supreme Court, inter alia, denied petitioners' motions for renewal and reargument of the motion for class certification and common fund attorneys' fees.

On appeal and cross-appeal, the Second Department issued its Opinion and Order of January 15, 1992, reported at 174 A.D.2d 253, 579 N.Y.S.2d 684, Pet. p. 7a-24a ("Duffy I"), which modified the order and judgment of Supreme Court, Queens County, by deleting those portions of that order and judgment which granted petitioners' declaratory and injunctive relief and, as so modified, affirmed it. Applying the test set forth in Chevron Oil v. Huson, 404 U.S. 97 (1971), the Court held that Davis

should be given only prospective effect. 174 A.D.2d at 264-65, 579 N.Y.S.2d at 691.

The Second Department expressly rejected for independent reasons petitioners' cross-appeals with regard to § 1983 relief and class certification. It agreed with the lower court's rationale for dismissing the cause of action for damages under 42 U.S.C. § 1983, adding that, in any event, respondents are protected by the doctrine of qualified immunity. 174 A.D.2d at 266, 579 N.Y.S.2d at 692. The Court also agreed that class certification was properly denied because, where governmental actions are involved, subsequent plaintiffs are adequately protected under the doctrine of stare decisis and because a claim for tax refund is personal to the taxpayer and does not constitute a protest on behalf of each member of the proposed class, citing Matter of Crociata v. State Tax Commission, 133 Misc. 2d 855, 508 N.Y.S.2d 842 (Sup. Ct., Albany Co., 1986), aff'd on other grounds, 134 A.D.2d 112, 523 N.Y.S.2d 923 (3d

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In addition, the Second Department explicitly agreed with the lower court's decision regarding the action for money had and received against the City and added that the lower court properly denied petitioners' post-judgment motions seeking, inter alia, renewal or reargument of the denial of class certification and attorneys' fees under the common fund doctrine.

By order dated April 7, 1992, the Court of Appeals of the State of New York, sua sponte, dismissed petitioners' appeal taken as of right pursuant to New York CPLR 5601(b)(1). Pet. p. 51a-52a, 79 N.Y.2d 976, 592 N.E.2d 798 (1992). By order dated July 7, 1992, the Court of Appeals denied petitioners' application for leave to appeal pursuant to New York CPLR 5601(a)(1)(i) and 5514(a). Pet. p. 53a-54a, 80 N.Y.2d 890, 600 N.E.2d 627 (1992).

Petitioners then filed their first petition for certiorari in this Court. While that petition was pending, this Court rendered its decision in Harper v Virginia Department of Taxation, Pet. p. 45a, 509 U.S. ___, 113 S. Ct. 2510 (1993).

On June 28, 1993, this Court vacated the Second Department's decision that Davis should be applied prospectively only and remanded the case "for further consideration in light of Harper". Pet. p. 45a, 509 U.S. _, 113 S. Ct. 3027.

Although respondents on remittitur initially continued to litigate the issue of remedy, the State announced on June 27, 1994, that it would "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under [Davis and Harper] and who have

filed timely administrative claims for refunds with the Department of Taxation and Finance."

As a result, the Second Department, in its decision and order dated August 8, 1994, dismissed respondents' appeals, writing, "the issues affected by the remittitur of the United States Supreme Court for further consideration in light of Harper, i.e., those relating to remedy on the potential refunds, are academic". The Second Department also dismissed petitioners' cross appeals, writing that "plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in Duffy I, and need not be reexamined". On the same date, by separate decision and order, the Second Department recalled and vacated its prior order dated July 19, 1994, which had granted petitioners' attorneys a temporary restraining order and ordered that the issues regarding the attorneys' right to fees for the petitioners/clients, who had

retained them, and the existence of any charging lien under Judiciary Law § 475 be set down for hearing in Supreme Court, Queens County. Pet. p. 1a-6a, __A.D.2d__, 616 N.Y.S.2d 48.

Petitioners then filed and served a motion for leave to appeal to the Court of Appeals of the State of New York, along with a motion for a preliminary injunction. By order dated August 18, 1994, Judge Bellacosa granted the injunctive relief requested pending review by the full Court (Pet. p. 57a-59a).

On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and vacated the previously entered stay. 84 N.Y.2d 838, 641 N.E.2d 149. Also on September 1, 1994, petitioners filed an application with this Court for a stay pending the petition in this case. That application was denied by Justice Thomas (Pet. p. 60a). The application was renewed to Justice Souter on September 2, 1994, who then referred it to the full

Court. That application was denied on September 14, 1994 (Pet. p. 61a).

## POINT I

## THE DECISION BELOW IS IN FULL ACCORD WITH THE MANDATE OF THIS COURT IN DUFFY I.

### (1)

There is no need to explain the meaning of the mandate of Duffy v. Wetzler, 509 U.S. ____, 113 S. Ct. 3027 (1993), in this forum. It is, however, necessary to describe how the decision of New York Supreme Court, Appellate Division, Second Department, which has been totally mischaracterized by petitioners, is fully consistent with that mandate.

In granting petitioners' first petition for certiorari, this Court remanded Duffy for reconsideration in light of Harper v. Virginia Department of Taxation, 509 U.S. __, 113 S. Ct. 2570 (1993). Petitioners take issue with the Second Department's refusal to reexamine the issues of

class certification, damages under 42 U.S.C. §1983, and common fund attorneys' fees. They argue that, "[i]n light of Harper, the fundamental premise of the Second Department's rulings in Duffy I and therefore Duffy II, has been eliminated." Since Harper did not address the issues of class certification, damages under 42 U.S.C. §1983, or common fund attorneys' fees, this statement could only be valid if the Second Department had ruled in Duffy I that it did not have to address these issues because it had decided not to require that refunds be paid. Even though it was not necessary to address these issues, the first opinion of the Appellate Division did, in fact, discuss liability for damages under §1983 and class certification on the merits. They also specifically affirmed the lower court's denial of the various motions, including the motion for attorneys' fees under the common fund theory. Thus, since the Second Department had examined all of these issues in Duffy I, independent of the refund issue, and since nothing in

Harper was relevant to these issues, the Second Department cannot in any sense be said to have flouted this Court's mandate by refusing to reexamine these issues on remand.

Petitioners argue that the requirement of a "meaningful opportunity" for "relief" sufficient to "satisfy the Due Process Clause of the Fourteenth Amendment", as set forth in Harper and in McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), on remand, 574 So. 2d 114 (Fla. 1991), necessarily includes a requirement that a taxpayer's attorneys' fees incurred in connection therewith be paid as well,[1] stating:

> In view of the expenses attendant to prosecuting these actions for relatively small claims, federal constitutional and statutory rights will be eliminated in New York for all but the wealthy. The Due Process Clause and Equal Protection Clause ... and 42 U.S.C. §1983 will each be written in New York to protect only "wealthy" persons rather than all persons. Pet. p.13.

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[1] It does not matter to petitioners whether the vehicle for payment of those fees is class certification, §1983 liability, or the common fund theory.

This interpretation is completely unsupported by even the most expansive reading of Harper and McKesson. Since neither Harper nor McKesson in any sense require that attorneys' fees be paid in connection with a claim for a tax refund, the Second Department decision, effectively denying plaintiffs' various bids for fees, was in no way in conflict with this Court's mandate in Duffy I.

(2)

Petitioners choose to introduce their "Reasons for Granting the Writ" with a series of ten statements, only two of which are direct quotes, which purport to characterize respondents' "war of attrition against federal retirees". Pet. p. 10. To the extent these statements are varied and seemingly contradictory, they merely reflect the state of flux in which the law existed regarding the issues of refunds and/or they are taken out of context.[2] Ultimately, the

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[2] Of course, certain apparent inconsistencies are more a result of inaccurate paraphrasing. For example, the second (continued...)

State decided to pay full State and City refunds, with interest, to all those who had filed timely, valid refund claims. Thus, the present situation is in direct contrast with that presented in Reich v. Collins, __U.S.__, 1994 WL 675214 (U.S.Ga)(1994).

## POINT II

## CITY RESPONDENTS ARE NOT LIABLE FOR DAMAGES PURSUANT TO 42 U.S.C. §1983.

### (1)

Petitioners maintain that, pursuant to this Court's holding on retroactivity enunciated in Harper, the Second Department was obligated to apply this Court's decision in

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[2] (...continued)
"changing" position presented by petitioners alleges that there was a statement in the Utica Observer Dispatch, dated April 14, 1989, to the effect that "Federal retirees could but need not apply for refunds in order to be protected." emphasis supplied. In the article referred to, the State representative repeatedly instructed that protective refund claims should be filed and never used the word "could".

Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992)[3] and Hafer v. Melo, 502 U.S. 21 (1991), which were both decided subsequent to the trial court's decision in Duffy I. However, neither Hafer or Collins could have altered the trial court's holding, affirmed by the Appellate Division, regarding the liability of the City respondents for damages pursuant to 42 U.S.C. §1983.

In Hafer, this Court held that state officials may be sued in their individual capacities pursuant to 42 U.S.C. §1983 and that the Eleventh Amendment does not provide any protection just because of the "official" nature of their acts. The trial court in Duffy I did not hold that the City respondents had immunity because of the official nature of their acts. Rather, it held that the City respondents never "acted" regarding the acts complained of in that New York State is responsible for administering the City's Personal

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[3] Petitioners argue that Collins would have clearly dictated a different result in Duffy II. Yet, it was not even cited in petitioners' briefs on remand.

Income tax, including the granting or denial and payment of refund claims. New York City Administrative Code §11-1797(a).[4]

This Court established in Collins that two questions need to be asked where a §1983 claim is asserted against a municipality. It must be determined whether or not the plaintiff's harm was caused by a constitutional violation and, if so, whether the municipality was responsible for the violation. Collins p. 1063. In the case at bar, the City respondents never acted and, thus, regardless of whether or not there was a violation, the City respondents could not be

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[4] In the City Respondents' Brief on cross-appeal in Duffy I, the City respondents argued that the lack of personal involvement is only a defense in a personal capacity lawsuit. The argument was framed in that manner as a response to an argument in petitioners' brief. As so framed, it would not provide a defense to the City or to the individuals in their official capacity. However, the City respondents asserted the broader argument in the lower court, that they did not and could not have "acted" with respect to the refund claims in question within the meaning of 42 U.S.C §1983.

held responsible for the acts complained of, even under Collins.

Additionally, while it was not part of the trial court's ruling, the City respondents argued and continue to maintain that a violation of 4 U.S.C §111 is not actionable under 42 U.S.C. §1983. Dennis v. Higgins, 498 U.S. 439 (1991); Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).

Finally, the grounds advanced by the trial court and affirmed by the Second Department for rejecting relief under §1983 are not vitiated simply because one aspect of the Court's dicta does not apply. The Second Department stated in dicta that, in addition to the grounds for rejection given by Special Term, qualified immunity would also be enough to reject plaintiffs' claim. Admittedly, such a defense would not bar an action against a municipality. Owen v. City of Independence, 445 U.S. 622 (1980), reh'g denied, 446 U.S. 992 (1980).

In attempting to present the issue of class certification to this Court for review, where it is otherwise a non-reviewable question of state procedural law, petitioners assert that the denial of class certification by the court below is "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law", citing Felder v. Casey, 487 U.S. 131, 153 (1988). In further support of this proposition, the petitioners also cite Garrett v. Bamford, 538 F.2d 63, 71 (3d Cir., 1976), cert. denied, 429 U.S. 977 (1976), where the Court held that a suit could be brought against the state in federal court despite the Tax Injunction Act because a class action was not available in the state courts.

The petitioners, however, chose to initiate suit in the state courts and the general rule is that "federal law takes the state courts as it finds them." Howlett v. Rose, 496 U.S. 356 (1990). Felder and Howlett represent narrow exceptions to this general rule. Felder involved a notice of

claim prerequisite; Howlett a state law sovereign immunity defense. In both cases, the state law in question was "outcome - determinative", Felder, supra, 487 U.S. at 151, that is, the application of the state statute could prohibit someone from prevailing in the §1983 litigation in question. In the case at bar, New York's class action statute only prohibits the §1983 litigation from proceeding as a class action. Nothing in the New York Civil Practice Law and Rules prevents individual litigants from either initiating their own litigation or waiting for the outcome of one lawsuit, where the government entity automatically applies the ruling to those similarly situated under the doctrine of stare decisis.

## POINT III

**THE CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES ISSUES WERE BOTH PROPERLY DECIDED BY THE COURTS BELOW. MOREOVER, THE DENIAL OF CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES DOES NOT PROVIDE A BASIS FOR GRANTING A WRIT OF CERTIORARI.**

(1)

The Second Department's decision regarding class action certification is entirely consistent with New York case law in this area. New York has repeatedly held that class action certification is inappropriate in a case involving governmental actions since subsequent plaintiffs will be adequately protected under the doctrine of stare decisis. Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337 (1986); Matter of Dumbleton v. Reed, 40 N.Y.2d 586, 589, 357 N.E.2d 363, 365 (1976); Martin v. Lavine, 39 N.Y.2d 72, 75, 346 N.E.2d 794, 795 (1976); Brady v. State of New York, 172 A.D.2d 17, 25, 576 N.Y.S.2d 896, 900 (3rd

Dept., 1991) aff'd on other grounds, 80 N.Y.2d 596, 607 N.E.2d 1060 (1992), cert. denied, __U.S.__, 113 S. Ct. 2998 (1993); Gandolfi v. City of Yonkers, 101 A.D.2d 188, 198-199, 475 N.Y.S.2d 429, 435-436 (2d Dept., 1984), aff'd. for reasons stated in opinion below, 62 N.Y.2d 995, 468 N.E.2d 699 (1984); Conklin v. Town of Southampton, 141 A.D.2d 596, 529 N.Y.S.2d 517 (2d Dept., 1988).

Regarding the issue of attorneys' fees under the common fund theory, it is true that New York courts have recognized the common fund doctrine as an exception to the American rule of not awarding attorneys' fees to the prevailing party. We are aware of no case, however, in which a New York court has awarded attorneys' fees in a tax refund suit. New York courts, moreover, have focused on the limitation of a court's power to award attorneys' fees in cases where a fund is created by operation of stare decisis, holding that such an award is warranted only in

exceptional cases. Realty Equities v. Gerosa, 30 Misc. 2d 481, 489-491, 209 N.Y.S.2d 446, 458 (Sup. Ct., N.Y. Co., 1960), citing Sprague v. Taconic Bank, 307 U.S. 161 (1939). Thus, both class certification and the issue of attorneys' fees under the common fund theory were correctly decided and consistent with the law in New York.

(2)

This Court has repeatedly held that it will not review state court judgments which are based upon adequate and independent state grounds, that is, it will only review state court judgment to the extent that they incorrectly adjudicate federal rights. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). Petitioners go to great lengths to link the denial of class certification and common fund attorneys' fees, otherwise purely questions of state procedural law, to a federal right, thereby attempting to confer jurisdiction on this Court. First, petitioners allege that the denial of class certification and common fund attorneys' fees conflicts with

the holdings of this Court, citing Deposit Guarantee National Bank v. Roper, 445 U.S. 326 (1980). In Deposit Guaranty this Court extolled the virtues of class certification and held that its denial is appealable even after final judgment. Deposit Guarantee at 338-339. Respondents do not dispute the merits of class certification in appropriate circumstances. Nor is it alleged that petitioners do not have the right to appeal the lower court's denial merely because final judgment has been entered.[5] Respondents argue instead that the trial court and the Second Department properly applied state law to a state procedural issue, which does not otherwise affect a federal right within the meaning of this Court's holdings. In contrast, Deposit Guarantee

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[5] In this regard, petitioners quote the Second Department for petitioners' inference that the Court held the appeal of the denial of class certification to be "academic". Pet. p. 22. While the Second Department did determine the refund issue to be "academic" in light of the State's decision to pay refunds, it did not state that the appeal of the denial of class certification was academic, but rather that it need not reexamine that issue.

involved class certification pursuant to the Federal Rules of Civil Procedure.

Next, petitioners argue that denial of class certification extinguishes "the due process rights of plaintiffs to share the financial burden in prosecuting this claim pursuant to the class action statute ...". Pet. p.23. While this Court has looked favorably upon class actions as a vehicle to ease these "financial burdens", Deposit Guarantee, it has never referred to this procedural device as a "right" protected by the due process clause.[6]

Finally, petitioners refer to the policy reasons why this Court should review the denial of class certification and attorneys' fees. As this Court is well aware, the policy concerns go both ways. Deposit Guarantee, at p. 339. New York case law holds that in cases such as the present, the good policy promoted by denying class certification and

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[6] Obviously, if attorneys' fees were guaranteed by the Due Process Clause, there would be no need for the numerous statutory attorneys' fee provisions.

common fund attorneys' fees outweighs any of the policy arguments in favor of certifying the class and awarding fees. Unless plaintiffs can assert a valid federal right denied by the denial of class certification or attorneys' fees, they have not asserted adequate grounds for this court to exercise its powers of review.

## CONCLUSION

**THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.**

December 9, 1994.

Respectfully submitted,

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